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No. 98-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

BELL ATLANTIC CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Court should take this case because the Special Provisions constitute a revolutionary expansion of congressional power that should not be permitted to occur at all, let alone without this Court's plenary review. The Government and the private respondents, by their failure to point to any similar congressional acts in our history, and their resort to mischaracterization of both what this Court's decisions hold and what the Special Provisions do, have confirmed that the Special Provisions are a sharp break with settled constitutional traditions. For the Special Provisions to be valid, Congress must have what are undisputedly new powers: not to confer voluntary benefits on named persons, but to impose involuntary burdens; not to respond to an Article III case by waiving its own rights in the case or writing *general* laws that supersede the law governing in the case, but to seize control of the case by imposing involuntary burdens only on the parties to the case on the very subject of the case. The power claimed by Congress in the Special Provisions is the power, in everything but name, to enter a judgment against named parties. This claim of power is unprecedented in our Nation's history.

Despite the novelty of the Special Provisions, the majority opinions in two circuits, over vigorous dissents, have given an apparently untroubled blessing to the sweeping new congressional power on which the Special Provisions necessarily rest. The effect is a radical and dangerous shift of power from the Article III courts to Congress. This realignment of the long-settled relations of the Branches, moreover, rests on a series of misreadings of this Court's decisions. This Court should grant review to repudiate those misreadings and thus forestall the consequences that respondents themselves tout: the elimination of the time-honored, constitutionally critical distinctions between imposing individualized burdens and conferring individualized benefits (or waiving Government rights in individual cases) and between enacting a general law and entering a case-specific judgment. Congressional entry of

burdensome judgments in Article III cases should continue to remain out of bounds.

A. Usurpation of Judicial Power. 1. The narrowest ground on which the Special Provisions should be struck down is the separation-of-powers ground, which (unlike either equal protection or bill of attainder principles) applies only to the Federal Government and focuses specifically on Congress's interference with pending Article III cases. The Constitution not only limits Congress to exercising the legislative power but forbids it to usurp the judicial power. Congress unconstitutionally usurps the Article III judicial power when it imposes burdens solely on parties to an Article III case directly on the subject that is in controversy in their case: whatever Congress calls it, that is the entry of a congressional judgment in an Article III case.

Four Justices explained in 1990: "The exercise of judicial power involves adjudication of controversies and imposition of burdens on those who are parties before the Court." *Missouri v. Jenkins,* 495 U.S. 33, 66 (1990) (Kennedy, J., joined by Rehnquist, C.J., O'Connor, Scalia, JJ., concurring in part and concurring in the judgment). The Court made the same point in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). In describing "the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases," the Court quoted President Lincoln's recognition of the defining characteristic of the judicial power—that judicial directives are only " 'binding in [the] case, upon the parties to a suit, as to the object of that suit.' " *Id.* at 224, 225. These descriptions apply perfectly to the Special Provisions, which adjudicate that 20 named parties to the Bell decree were in need of special proscriptions and impose, only on them, a series of proscriptions relating directly to the line-of-business issues that were in continuing litigation in the Article III case. Unless the constitutional line between enactment of a law and entry of a judgment is now to be abandoned, and Congress is to be broadly freed to intrude

itself into Article III cases through actions limited to the parties and the case, the Special Provisions cannot stand (irrespective of whether they constitute "punishment" under the bill of attainder clause).

2. Like the Fifth Circuit, respondents rely on three decisions of this Court as supposedly approving such congressional impositions of burdensome judgments binding only Article III parties, but none of them provides any such approval. The statute upheld in *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), was not limited to named Article III parties: it legalized a bridge, to the (alleged) detriment of every person who might then have to pass under it. The statute upheld in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), legalized certain activities that might affect owls in 13 national forests, setting a new legal standard good against everyone who might use those forests. Both cases involved statutes that were binding against the world, not judgments binding only against identified parties. *Robertson*, indeed, expressly reserved the issue of the constitutional validity of legislation that is practically, although not on its face, case specific (503 U.S. at 441)—a reservation that confirms that respondents have mischaracterized *Wheeling* and *Robertson*.

Respondents' reliance on this Court's decision in *Plaut* all but turns that decision on its head. *Plaut* did not involve, or therefore approve, a statute imposing case-related burdens on named parties to an Article III case. Indeed, the Court there struck down the statute at issue and elaborated the very constitutional principles and pre-1787 history that, fairly followed, lead to invalidation of the Special Provisions as an impermissible congressional entry of a judgment.

Contrary to respondents' suggestion, this Court did not approve a congressional party-and-case-specific judgment in what it said in one footnote in *Plaut*—on which respondents and the lower courts have placed central reliance. 514 U.S. at 239 n.9. The Court used limited language even about the subject of person specificity (unre-

lated to pending Article III cases) and did not address at all the question here involving congressional impositions of burdens on parties to an Article III case on the subject of the case. The evident ease of misunderstanding or misuse of *Plaut's* footnote 9 to validate congressional interference in pending cases heightens rather than lessens the need for this Court's review.

3. Perhaps recognizing that their relied-on authorities do not approve congressional imposition of burdensome judgments limited to Article III parties, respondents make a brief attempt to characterize the Special Provisions as something other than a judgment against the 20 named Bell companies. *See* MCI Br. in Opp. 17-18; *see also* U.S. Br. in Opp. 13. They argue that the Provisions really apply to particular local telephone exchanges, rather than the Bells, and they observe that the Provisions apply not just to the Bells but to any "successor or assign." But this attempt to rewrite the Special Provisions does not in any way diminish their party-specificity or character as a personal judgment against the Bells.

The application of the Special Provisions turns entirely on the affiliation of a local exchange with one of the 20 named Bells, whether that affiliation is present, future, or past. The Special Provisions are not limited to particular exchanges—much less to regional groupings of exchanges —independent of Bell affiliation.[1] They apply not only to the particular exchanges a Bell owned in 1996, but also to any other exchange it acquires in the future in a State where it was a local carrier in 1996.[2] The new exchange

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[1] Indeed, the Special Provisions apply to each Bell company even if it becomes independent of its 1996 affiliated companies. The Special Provisions do *not* depend for their application on any region-wide common ownership.

[2] To identify only some of the substantial urban areas served in 1996 by non-Bell companies: Las Vegas exchanges would be covered if Nevada Bell acquired them; exchanges in Tampa and St. Petersburg would be covered if Southern Bell acquired them; Cincinnati's exchanges would be covered if Ohio Bell acquired them; numerous exchanges in Los Angeles would be covered if Pacific

becomes corrupted by the Bell acquisition. It is self-evidently the Bell companies themselves, not particular exchanges, that were the subject of the congressional judgment. 47 U.S.C. § 153(4).

The language of "successor or assign" confirms, rather than refutes, the character of the Special Provisions as a personal judgment. That was the precise language of the Bell decree itself. *United States v. AT&T*, 552 F. Supp. 131, 228 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983) (decree Section III). And it is common for injunctions issued by courts—including injunctions regularly obtained by the Government—expressly or implicity to cover not only the named corporate party but successors or assigns.[3] Such coverage, in the Special Provisions, does nothing to make them other than a judicial act by Congress. Despite respondents' efforts to save them by rewriting, the Special Provisions are unquestionably a personal judgment against each of 20 named Bell companies.

4. The Special Provisions thus cross a line that Congress has until now respected. Congress may respond to judicial decrees by waiving the public's rights (as it did in Section 601 of the Telecommunications Act of 1996, 110 Stat. 143-44) or by changing the generally applicable law (as it did in the marketing-opening provisions of 47 U.S.C. §§ 251-253). What it may not do is to impose restrictions limited to Article III parties on the subject of their case, which is nothing but a congressional entry of a judgment.

Bell acquired them; and numerous exchanges in the Dallas area would be covered if Southwestern Bell acquired them.

[3] *See Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 179-80 (1973); *United States v. National Lead Co.*, 332 U.S. 319, 328 n.4 (1947); *Bristol-Myers Co. v. FTC*, 738 F.2d 554, 565 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *American Home Products Corp. v. FTC*, 695 F.2d 681, 714 (3d Cir. 1982); *De Jong Packing Co. v. United States Dep't of Agriculture*, 618 F.2d 1329, 1338 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 771 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2956, at 350 (1995).

A violation of this structural limit on Congress cannot be saved based on the inclusion of some benefits in the overall measure or the participation in the legislative process of the parties thereafter bound. *See New York v. United States*, 505 U.S. 144, 181-83 (1992). Congress cannot so easily evade the vital discipline inherent in use of general classifications, namely, that legislators and the public must carefully consider their wisdom in light of the possibility that they might come to apply beyond a fixed range of specific individuals. Nor can courts properly be asked to uphold a party-and-case-specific measure by hypothesizing any number of merely conceivable generic laws that Congress might, or might not, have enacted.[4] Respondents profess not to see the constitutional line crossed by the Special Provisions, but this Court should recognize its importance and not allow it to be erased.

B. Equal Protection. Respondents' defense of the equal-protection ruling in this case, like their defense of the separation-of-powers ruling, would require this Court to acquiesce in a rewriting of its precedents by the lower courts. The defense rests on a simple blindness to the

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[4] It is anyone's guess which of several "rational" lines Congress might draw if it had to act generally. The courts cannot make the policy judgments required to choose among such options. Critically, any proposal based on incumbency, size, or regional affiliations would force consideration of the genuine advisability of such a line. And that consideration would take place with attention to the fact that any such classification might come to embrace non-Bells over time. Even a classification that was identical in practical effect in February 1996 might have different real-world application a few years later.

In noting that "other LECs, including Cincinnati Bell, Southern New England Telephone, and Sprint, had already begun to provide long-distance service" (U.S. Br. in Opp. 17), the Government effectively acknowledges that GTE, under a consent decree of its own, was not offering long-distance service at the time of the 1996 Act. The 1996 Act released GTE from its decree (Section 601(a)(2), 110 Stat. 143-44)), and as the record below established, GTE immediatedly thereafter began offering long-distance service. *See* Pet. App. 70a; R. 371-74.

obvious premise underlying every one of the cited decisions establishing the deferential approach to modern "rational basis" review of economic legislation. U.S. Br. in Opp. 17-20; MCI Br. in Opp. 27-28. All of those decisions involve laws that employed a *generic, person-neutral* classification; and, once that premise is satisfied, a highly deferential standard of review applies because of the "practical necessity" of legislative use of classifications. *Romer v. Evans,* 517 U.S. 620, 631 (1996). None of this modern case law, however, allows Congress to violate—as the Special Provisions do—the threshold requirement of person-neutrality in imposing burdens on which deferential review rests.

To the contrary, a host of this Court's decisions insist on person-neutrality as the threshold test for equal protection in restricting freedoms (*see, e.g., McFarland v. American Sugar Refining Co.*, 241 U.S. 79 (1916) (per Holmes, J.)), and the Court recently has reaffirmed the fundamental principle of impartiality on which that test rests and applied the test at the threshold of equal-protection analysis (*Vacco v. Quill*, 117 S. Ct. 2293, 2297-98 (1997)). *See* Pet. 25-26. Thus, this standard is the very opposite of "a new requirement." MCI Br. in Opp. 28. Although respondents pretend otherwise, the authorities supporting the threshold demand for neutrality in laws that impose involuntary burdens have never been overturned or questioned.

Such laws are categorically different from laws that do no more than present targeted opportunities for voluntary acceptance of government benefits. (Even as to such measures, respondents' principal "modern" authority, *New Orleans v. Dukes,* 427 U.S. 297 (1976), did not involve any named beneficiaries, but a generic "grandfathering" provision. *See* U.S. Br. 20 n.12.) Despite its current disavowal, the Government plainly recognized this important distinction in its brief on certiorari in *Atonio v. Wards Cove Packing Co.*, 513 U.S. 809 (1994), where it shunned mere rationality as the standard even though *Atonio* did not involve any race-based or other suspect

classification. There is no justification in legislative necessity for abandoning the historical tradition setting a threshold requirement of neutrality in burden-imposing measures, and good reasons not to do so. *See Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). This Court should not permit an important principle of its equal-protection doctrine—reflected in recent decisions, long honored by Congress, and amply justified—to be silently repudiated by the lower courts.

C. Bill of Attainder. SBC and US WEST have provided a detailed discussion of the bill of attainder aspect of the case. We note here only the error of the Government's assertion that the Act does not " 'deprive[]' [the Bells] of 'rights . . . previously enjoyed.' " U.S. Br. in Opp. 14 (citation omitted). As the Petition observed (Pet. 5 & n.3), the Bell decree restrictions were not permanent; they provided for the Bells to obtain their freedom (either under the usual standards for decree modification, Fed. R. Civ. P. 60(b), or when there was no substantial possibility a Bell could harm competition in the market to be entered); they did not demand local market competition; and the Justice Department committed to "limit the duration of the restrictions to the minimum period required by the state of technology and competition."[5] The Special Provisions not only reimpose some restrictions the decree court already had lifted (47 U.S.C. §§ 274, 275), require local market opening, and impose some new perpetual bars (47 U.S.C. § 273), but they subject the Bells to permanent exposure to revocation of long-distance authority once that authority is obtained (47 U.S.C. § 271(d)(6)(A)(iii)).

D. Severability. The Government's discussion of severability underscores why that issue should be joined with the constitutional merits, even aside from the public inter-

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[5] Response of the United States to Public Comments on Proposed Modification of Final Judgment at 62, *United States v. Western Electric Co.*, No. 82-0192 (D.D.C. filed May 20, 1982).

est in fully resolving this case correctly during this Term. U.S. Br. in Opp. 23-24. The Government unabashedly endorses a wholly unprecedented approach to severability: a court may parse through an enactment and decide which of its provisions were sufficiently tied to the invalid ones that they must also fall, while leaving others standing. The Government cites not a single precedent for such judicial reconstructive surgery on legislation, and such an apparently novel approach to severability would raise separation-of-powers problems that mirror those presented by the Special Provisions themselves.

The Government invokes the specter of a return to judicial supervision under the Bell decree as a reason for not addressing the constitutional validity of the Special Provisions. U.S. Br. in Opp. 24, *see* MCI Br. in Opp. 29-30. That would not be a good enough reason for allowing the invalid law to stand even if the predicted result were clear, but in fact the prediction is wrong under familiar severability principles. It hardly advances the inquiry to say that the 1996 Act was a "hard-fought compromise" (Pet. App. 33a, quoted at U.S. Br. in Opp. 23), because every law is a compromise, with all of its parts playing some role in the overall package, and severing *any* unconstitutional provision always leaves the resulting statute different from the enacted one. Rather, the relevant question is whether the remainder of the statute is supported by policies that can stand independently of the severed provision or whether the opponents of severability meet their burden of showing that the remainder, by itself, clearly makes no sense in terms of congressional policy. That standard requires severability here.

The decree-superseding provision, Section 601, is not textually linked to the Special Provisions. Moreover, termination of the Bell decree was amply supported by Congress's independent policy against telecommunications regulation by judicial decree (reflected in the fact that Congress eliminated two other decrees along with the Bell decree) as well as by Congress's imposition of the *general* market-opening provisions of Sections 251-253, which

undermined the central premise for the decree restrictions. Invalidation and severance of the Special Provisions, without resuscitation of the Bell decree, would leave the Bell companies fully subject to those market-opening provisions, which indeed, are the core requirements for entry into the long-distance market under Special Provision Section 271. Severance here is thus the next-best approximation of congressional intent that is required upon fulfilling the constitutional responsibility to invalidate an unconstitutional statutory provision. It is certainly required given the presumption of severability and the placement on respondents of the burden of proving otherwise.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[6] The Government points out that the severability clause of the Communications Act, 47 U.S.C. § 708, applies to "the remainder of the Act," yet the provision directing that the Communications Act shall supersede the law applicable in the Bell decree case, Section 601 of the 1996 Act, is not in the Communications Act. U.S. Br. in Opp. 23 n.13. But if the Special Provisions (which are part of the Communications Act) are severable from the rest of that Act, even from other provisions to which they textually relate (*see, e.g.*, 47 U.S.C. § 160(d), referring to 47 U.S.C. § 271), it would be very odd for the Special Provisions to be *in*severable from non-Communications Act provisions to which they do *not* textually relate—such as Section 601. The Government cites no precedents for reaching out to fully constitutional, textually unrelated parts of other Acts.